whether the injury to the plaintiff's health was a reasonable and natural consequence of the fright.

This case again calls attention to the curious divergence of the courts in their allowance of recovery for the mental suffering caused by sorrow and that form of mental disturbance produced by fright. The Maryland court says that "it may be considered as settled that mere fright without any physical injury resulting therefrom can not form the basis of a cause of action." But recovery is allowed for sorrow alone by a number of courts, following the lead of the Texas court in *So Relle* v. *W. U. Tel. Co.*, 55 Tex. 308. Cf. MICHIGAN LAW REVIEW, Vol. 4, p. 244, and cases there cited. The question naturally arises, what is the reason for this distinction? The California court in the case of *Sloane* v. *S. Cal. Ry. Co.*, 111 Cal. 668, attempted to answer the question by saying that "a nervous shock or paroxysm or a disturbance of the nervous system [caused by fright] is distinct from mental anguish and falls within the physiological rather than the psychological branch of the human organism. This seems to be a distinction without a difference for it gives us no means of determining what is physiological as distinguished from psychological. In what way is insomnia, for example, produced by a serious fright different from the insomnia produced by deep sorrow, except that the fright is usually of short duration and the sorrow likely to be continuous? It seems not unlikely that the real reason that the courts have had for allowing recovery for sorrow alone and denying it for fright alone rests upon the same argument that has led most of our courts to deny recovery for mental anguish of any sort; namely, the difficulty of proof. It is plainly within the experience of the average person [the juryman] that keen suffering would almost inevitably result to a father by being kept away from the bedside of his dying child, though there might be no manifest marks of that sorrow. On the other hand, in the cases where fright is alleged as a variety of mental suffering endured, it is by no means so plain that the suffering actually has occurred unless some physical result therefrom is shown.

The leading case brings one more court over to the minority that allows recovery for fright as a form of mental anguish, if the proof thereof is plain, and we may well hazard the conjecture that if the courts have presented to them cases in which the causal relation is evident between the injuries complained of and the mental anguish produced by the negligent act, the tendency will be for them to range themselves on the side of those courts now in the minority, unless they should feel compelled by their own previous decisions to say, as did the Pennsylvania court in the Huston case, *supra*, that the question "is settled for this state and no longer open for discussion."

J. H. D.

NONCOMPLIANCE WITH STATUTORY REQUIREMENTS AS A DEFENSE TO SUITS BROUGHT BY FOREIGN CORPORATIONS WHERE THE IRREGULARITY HAS BEEN CURED SUBSEQUENTLY TO THE INSTITUTION OF THE SUIT.—The law is very much unsettled and the decisions are conflicting upon the questions and situations arising out of the failure of foreign corporations to comply with the

regulations and requirements laid down by the various states as prerequisites to their doing any business in these states. The questions involved depend to a considerable extent upon the peculiar wording of the particular statute in question, yet there is much conflict in the decisions upon statutes worded alike.

For this reason the questions presented by the recent case of *Amalgamated Zinc & Lead Co.* v. *Bay State Zinc Mining Co.* (1909), ... Mo. ..., 120 S. W. 31, are important. In this case, plaintiff, a corporation organized under the laws of New Jersey, sought to enjoin and restrain the defendant corporation from mining on a certain tract of land in Missouri. Plaintiff set up sufficient facts entitling it to a decree. The defense was that plaintiff had not complied with the laws of Missouri by filing a copy of its charter or articles of incorporation with the Secretary of State, and had no license to transact business in the state of Missouri, and therefore could not "maintain" a suit in that state. The statute read that no such foreign corporation could "maintain any suit or action" without filing the above mentioned papers. The evidence disclosed the fact that the suit had been brought one month before the papers were filed and the license granted.

The chief question to be decided was whether plaintiff could bring an action in the Missouri courts without license to do business in that state and, after having so brought the action, be permitted to maintain and prosecute it by taking out the required license before trial. The supreme court of Missouri answered this question in the negative. GRAVES, J., in rendering the opinion of the court, said that a prohibition against maintaining an action implied a prohibition against beginning or commencing it, since the beginning of the action was one of the necessary steps in maintaining it. He said that any other interpretation would render the statute nugatory, and would allow foreign corporations to do business in Missouri in defiance of the law until some party should plead its noncompliance. To allow the corporation to remedy the defect at that late hour would be contrary to the spirit of the statute and opposed to the public policy of the state.

The position taken by GRAVES, J., seems to be invulnerable, and it is difficult to understand why there has been so much conflict upon the question. The court in this case was confronted by the case of *Carson-Rand Company* v. *Stern et al.*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420, in which is laid down a doctrine directly opposed to that of the principal case. In the *Carson-Rand* case, BARCLAY, J., said that the prohibitory command did not reach the right to begin the action, and that there was a well defined distinction between beginning and maintaining an action. The court in the principal case met the difficulty by reversing the *Carson-Rand* case. The solution of the problem depends to a great extent upon a proper interpretation of the word "maintain" as used in the statutes. See 5 WORDS AND PHRASES, p. 4278, for judicial interpretation and definitions of "maintain."

"Maintain" as used in pleading means to support what has already been brought into existence, so that to maintain an action is not the same as to commence an action. *Moon* v. *Durden*, 2 Exch. 30. In this case the question to be decided was whether a certain statute prohibiting gaming and

rendering gaming contracts void should have a retrospective effect. With the exception of the dictum of PLATT, B. in the Moon case there seems to be no authority or precedent for the interpretation put upon "maintain" by BARCLAY, J., and, when we consider the fact that PLATT, B. was rendering a dissenting opinion, that he expressly limited his definition of "maintain" to questions of pleading, and that the remark was not necessary to the decision of the case, it is difficult to see how BARCLAY, J., could have gotten much support out of the remark. A few months after the *Carson-Rand* case was decided, the supreme court of California put a similar construction upon the effect of the word "maintain," but that could not have been an authority for the *Carson-Rand* case. *California Savings and Loan Society* v. *Harris*, 111 Cal. 133, 43 Pac. 525.

An interesting discussion of the question may be found in the note to the case of the *National Fertilizer Co.* v. *Fall River Five Cents Saving Bank et al.*, 14 L. R. A. (N.S.) 501 et seq.—The case being reported in 196 Mass. 458, 82 N. E. 671. The annotator prefacing his remarks upon the particular question involved says: "Of course in those jurisdictions in which it is held that any contract entered into by a foreign corporation before complying with the local statute is void, the particular question presented in the foregoing case could not arise, for if the contract is void from the beginning, subsequent compliance with the requirements of the statutes either before or after bringing suit would not remedy the defect. In those jurisdictions, however, which hold that such contracts are not invalid, but merely unenforceable by the corporation before its compliance with the statutory requirements, there is much difference of opinion as to the effect of a compliance after the commencement of the suit but before judgment." The *National Fertilizer Co.* case is opposed to the principal case. Here the supreme court of Massachusetts held that a similar statute was merely directory and that noncompliance with it resulted in a mere temporary disability, to remove which lies within the power of the corporation at any time; that the statute merely suspended the privileges of the courts during the period of non-compliance with the law; and that the purpose of the statute was to bring foreign corporations under the supervision and regulation of the state officials of Massachusetts. This is all very well, but the state officials seem to have other things to do than enforce compliance by these corporations, and it would seem that the best and simplest way to enforce compliance would be to allow private parties to plead the noncompliance as a defense to suits brought by these foreign corporations. If the ruling in the principal case were recognized as law everywhere, corporations probably would take greater pains to comply with the laws of the states, other than those creating them, in which they do business. Then again, if a private person knows that the noncompliance operates only as a temporary bar it is doubtful if he will plead it and thus call the attention of the state to the noncompliance.

RUGG, *J.*, in the *National Fertilizer Co.* case, gives a long list of authorities sustaining the view there taken, but these decisions are those of but four states—Massachusetts, California, Kansas and Arkansas. *State* v. *American Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N.S.) 1041 and *Buffalo*

Zinc and Copper Co. v. *Crump,* 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87—the first of the Kansas and Arkansas cases—find their authority and precedent in the early Missouri cases which, it has been shown, have been lately overruled by the principal case. The early California *Savings and Loan Society* case, *supra,* decided a few months after the *Carson-Rand* case, also found its precedent in the above dictum of the dissenting judge in the old *Moon* case. The Massachusetts statute expressly provided that "such failure shall not affect the validity of any contract by or with such corporation," so it is doubtful if these early Massachusetts cases are in point. See *C. B. Rogers and Co.* v. *Simmons,* 155 Mass. 259, 29 N. E. 580. Thus it appears that the decisions opposed to the principal case, though numerous, have a faulty origin and rest upon a poor foundation.

On the other hand, there is considerable authority and precedent for the construction put upon "maintain" by GRAVES, J., in the principal case. The supreme court of Minnesota, in the case of *G. Heilman Brewing Co.* v. *Peimeisl,* 85 Minn. 121, 88 N. W. 441, expressly and emphatically refused to follow the *Carson-Rand* case and held that a prohibition against maintaining an action implies a prohibition against beginning it. The same interpretation is put upon a similar statute in New York. *Halsey* v. *Jewett Dramatic Co.,* 114 App. Div. 424, 99 N. Y. Supp. 1122. The Illinois cases, *J. Walter Thompson Co.* v. *Whitehed,* 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; *United Lead Co.* v. *J. W. Reedy Elevator Mfg. Co., 222* Ill. 199, 78 N. E. 567, are in accord with the principal case. Many other courts construe somewhat similar statutes in practically the same way, but without a knowledge of the peculiar wording of these statutes reference to them would be of little value. "Men both in and out of the profession of law often speak of maintaining an action, having reference to one yet to be instituted." PARDEE, J., in *Smith* v. *Lyon,* 44 Conn. 175, 178.

Both Ohio and California have laws regulating the right of partnerships to sue, providing that they may not "maintain" any action upon any contract made with them in their partnership names until they have filed a certain certificate and made the publication required by statute. The Clark County Common Pleas Court of Ohio and the supreme court of California have held that the commencement of an action is a part of the maintaining of it, and that the statutes relate to the institution of the action as well as to its continuance. Hence the right to bring an action is prohibited unless the certificate has been filed and the publication thereof has been completed. *Kinsey & Co.* v. *Ohio Southern R. Co.,* 3 Ohio Dec. 249. *Byers* v. *Bourret,* 64 Cal. 73, 28 Pac. 61. If the right of a domestic partnership to bring suit is construed thus strictly, it would seem to be even more fitting and even more in accord with public policy for the courts of the states, other than the state of the corporation's birth, to require a rigid compliance with the laws in regard to foreign corporations by giving the same construction to the word "maintain." Many of these corporations are organized under state laws which are more lax and which give much greater powers than the laws of the particular state in which they are suing. This latter state should heed the public policy revealed by its own statutes, should be jealous of the rights and

powers of these foreign corporations, and should require a strict compliance with its laws before opening the gates to them and giving them the entré into its courts.

A corporation created by one state can exercise none of the privileges conferred by its charter in any other state except by the consent of the latter. *Farmers and Merchants Ins. Co.* v. *Harrah*, 47 Ind. 236. When a state legislature has realized the necessity of having supervision over the acts and transactions of these foreign corporations, and has seen fit to prescribe certain conditions before allowing them to enter for purposes, other, of course than the carrying on of interstate commerce, it would seem to devolve upon the courts of that state to carry out the legislative intent and policy so exhibited, by making these statutes as effective as possible rather than to render them almost nugatory upon some trivial and unsubstantial ground. Furthermore, it is believed that by giving to the word "maintain" its full meaning the result would be in accord with the principal case. The principal case seems to be a proper interpretation of the letter and spirit of the Missouri statute and to be in keeping with the public policy of Missouri as revealed by that statute. R. T. H.

IN ABSENCE OF PROOF WHAT IS THE PRESUMPTION AS TO THE LAW OF A COUNTRY NOT OF COMMON LAW ORIGIN.—A very interesting case is that of *Cuba R. Co.* v. *Crosby*, 170 Fed. 369, decided by the circuit court of appeals for the third circuit in May, 1909. The plaintiff was a citizen of Tennessee, and the defendant corporation a citizen of New Jersey. It appeared that the plaintiff, while working for the defendant in its planing mill in Cuba, was injured, the plaintiff claiming that the injuries were caused by the negligence of the defendant in failing to provide reasonably safe machinery and appliances. The defenses were assumption of risk and that the negligence, if any, was that of a fellow servant. The jury found for the plaintiff, and judgment was duly entered upon the verdict. It seems that the declaration did not aver the law of Cuba, nor did it charge that the facts alleged were by the Cuban law made unlawful and tortious, and no evidence was offered to that effect. It was contended that the trial court had erred in failing to direct a verdict for the defendant.

ARCHBALD, J., DALLAS, J. concurring, wrote the opinion affirming the judgment below. GRAY, J., dissented. The opinion of the majority was based upon the theory that nothing having been offered at the trial as to the Cuban law the presumption was that the lex loci was the same as the lex fori, and that the latter would therefore be applied, negligence being tortious and actionable at common law. GRAY, J., on the other hand, while conceding that such might be the rule applicable where the foreign law was that of a sister state or country wherein the common law prevailed, argued that inasmuch as the court would take judicial notice of the fact that Cuba is a Latin country with the civil law the same rule does not apply.

There are a great many cases on the proposition as to what is the presumption of foreign law when the foreign law is that of a sister state. In a great many cases the generally accepted rule is stated to be that it is pre-